

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Maria Mora-Villalpando,

Plaintiff,

v.

U.S. Immigration and Customs Enforcement,
U.S. Customs and Border Protection, et al.,

Defendants.

No. C18-655-JLR

Plaintiff's Cross Motion for
Summary Judgement

Note on Motion Calendar: March 15, 2019

Plaintiff, Maria "Maru" Mora-Villalpando, hereby respectfully submits her cross-motion for summary judgement and opposition to Defendants' motion for summary judgment in this case brought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and in support states as follows:

I. INTRODUCTION

U.S. Immigration and Customs Enforcement (ICE) placed Ms. Mora-Villalpando ("Plaintiff"), an outspoken immigrant rights activist, in removal proceedings in late 2017. She later learned that her I-213, an official ICE document which sets forth the basis to support a person's alleged alienage and removability, stated that she has "extensive involvement with anti-

1 ICE protest and Latino advocacy programs” and that she “has become a public figure.” First
2 Amended Complaint (Dkt. # 16) at ¶ 5.

3 Spurred by this discovery, Plaintiff filed a FOIA Request in February 2018 against ICE,
4 seeking information about the agency’s targeting of her and other immigrant rights activists. Her
5 FOIA request consists of three parts. The first part sought documents related to her own case
6 (“First Request”). *Id.* at ¶ 43. The second part sought information related to ICE enforcement
7 operations against other activists and individuals who speak out to the media (“Second
8 Request”). *Id.* at ¶ 44. The third part sought form I-213s pertaining to other activists and
9 individuals who speak out to the media (“Third Request”). *Id.* at ¶ 45.

10 ICE did not respond to her request in time and she subsequently filed this lawsuit. ICE’s
11 initial search immediately following this suit was limited only to records regarding her own case,
12 i.e., records responsive to the First Request. *Id.* at ¶ 57. This has been a key issue from the outset
13 of this litigation. *Id.* at ¶ 58.

14 After months of litigation and hundreds of released pages pertaining to Plaintiff’s
15 individual case, ICE – for the first time – admitted in its declaration that it *never* performed a
16 search responsive to the Third Request. *See* Declaration of Toni Fuentes (“Fuentes Decl.”) (Dkt.
17 # 36) at ¶ 34. ICE also never conducted a search responsive to the Second Request in the
18 databases where responsive information is most likely to be found.

19 Plaintiff’s Motion for Summary Judgment should be granted and ICE’s should be denied.
20 As explained below, ICE has failed to meet its burden that it conducted a search reasonably
21 calculated to uncover responsive records. The records sought by the Second and Third Requests
22 are most likely to be found in the databases of the Office of Enforcement and Removal
23 Operations (ERO). Apart from the ERO Policy Library, ICE’s declaration demonstrates that it

never searched those databases for anything other than documents specific to Plaintiff's removal case, i.e. documents that could be responsive to the First Request. ICE's decision not to perform these searches is unreasonable and a violation of FOIA. In two sentences that lack detail and are conclusory, ICE's declaration claims that it could not perform those searches because of the Privacy Act of 1974 and because it "does not specifically track" the information sought in the Second and Third Requests. ICE's reliance on the Privacy Act (5 U.S.C. § 552a) is wrong as a matter of law and is in violation of FOIA. ICE's claim that it did not do the search because it does not specifically track the requested information is unreasonable because it is contradicted by the declaration itself, case law, and information made publicly available by DHS. Finally, ICE's search was also inadequate because a number of the searches it *did* conduct were unreasonably limited with respect to the search terms used and the databases searched.

II. FACTUAL BACKGROUND

A. FOIA Request and Litigation

On February 23, 2018, Plaintiff submitted a multi-agency FOIA request to Defendants containing three subparts. *See* First Amended Complaint at ¶ 7. The first subpart of the FOIA request ("First Request") sought the following documents:

1. "Any and all records of communication within federal agencies or between federal, state, and/or local agencies relating to enforcement operations, investigations, intelligence gathering, surveillance, and/or issuance of a Notice to Appear against or relating to any of the SORs,¹ including, but not limited to Field Operations Worksheets, significant incident reports, intelligence reports, Forms I-203, and records within all DHS databases, including but not limited to the Deportable Alien Control System (DACS), Enforcement Integrated Database (EID), ENFORCE Alien Removal Module (EARM), and/or HSI databases such as the Significant Event Notification system (SEN), Investigative Case Management system (ICM), FALCON-SA, electronic records in the Enterprise Document Management System or the Electronic Immigration System, FBI

¹ Subjects of Record (SORs) refers to Ms. Mora-Villalpando, NWDC Resistance, and Latino Advocacy.

1 records, DOJ, criminal records, national intelligence records, NVC records,
 2 DOS records, Coversheets and Worksheets (including CARRP, TRIG, FDNS,
 3 and others), and all other records on behalf of, by, for, or otherwise referencing
 4 the SORs.

- 5 2. Copy of all records referencing and related to each of the SORs.
- 6 3. Copy of entire Alien records (A-Files), Petitioner records, Beneficiary records,
 7 Temporary Files (T-Files), Receipt Files (R-Files), Work Files (W-Files).
- 8 4. Copy of records relating to the SOR's connected in any way to any
 9 apprehension of the SOR's by CBP or ICE or the FBI, detention of the SOR's
 10 by CBP or ICE or the FBI, expedited removal of the SOR's by CBP or ICE,
 11 records regarding inspection or examination of the SOR's upon arrival at a U.S.
 12 port of entry, and/or any records relating to any voluntary returns the SOR's by
 13 CBP.
- 14 5. Copy of all notes and memos and post-it notes, whether handwritten or
 15 electronic; emails, whether archived or stored in inboxes, junk folders, locally,
 16 remote, subfolders, or other storage locations; and all other written information
 17 and records regarding each of the SOR's.
- 18 6. Copy of all FDNS-DB records, FDNS records, JTTF records, TECS records,
 19 OBIM records, FDNS-DS records, ATLAS records and results, SGNs, manual
 20 referral records, fraud tip referral records, FISAR reports, ASVVP records,
 21 CLAIMS and CLAIMS 3 records, BCS records, MFAS records, SER ADJ
 22 records, FIRS records, biometrics records, iDSM records, FACE records, ITL
 23 records, NCIC records, NDIS records, N-DEx records, LEO records, Guardian
 and e-Guardian records, No Fly records, TSC records, TRIP records, Consular
 Consolidated Database records, CI/HUMINT records, and all other electronic
 and paper information regarding each of the SOR's.
7. All Customer Relationship Management (CRM) and Customer Management
 Information System (CMIS) and similar records, including but not limited to the
 National Customer Service Center (NCSC) and local USCIS offices, InfoPass
 records, FBI Call Centers and Offices (local or international), CBP Call Centers
 including Headquarters and Office Call Centers, and other points of contact,
 regarding or by each of the SOR's.
8. All address records including but not limited to the Customer Relationship
 Interface Systems' (CRIS) Change of Address (CoA) component, AR-11's,
 AccurInt, and other record systems for any of each of the SOR's.
9. All other records and references to any SOR, including references to other
 agencies holding or withholding information about each of the SOR's."

1 *Id.* at ¶ 43. The second subpart of the FOIA request (“Second Request”) sought the following
2 documents:

3 “Any and all records containing, describing, relating, or referring to guidance,
4 guidelines, rules, policies, procedures, emails, trainings, press releases, public
5 statements, summaries, post-investigation reports and any other instructions or
6 directives, past or present, regarding enforcement operations undertaken against
7 individuals who:

- 8 1. provide a public statement or statements to the media regarding their
9 immigration status;
- 10 2. provide a public statement or statements to the media regarding
11 immigration enforcement of family members;
- 12 3. are involved in ‘anti-ICE protests’ and/or ‘immigrant rights’ activism;
- 13 4. are involved in ‘Latino advocacy programs,’ ‘immigration advocacy,’
14 ‘activism,’ and/or ‘organizing.’”

15 *Id.* at ¶ 44. The third and final subpart of the FOIA request (“Third Request”) sought the
16 following documents:

17 “Copies of any I-213s, **with identifying information redacted**, where ICE has
18 initiated enforcement action against an individual due to:

- 19 1. the individual's public statement or statements to the media regarding
20 their immigration status;
- 21 2. the individual's involvement in ‘anti-ICE protests,’ and/or ‘immigrant
22 rights’ activism; and/or
- 23 3. the individual's involvement in ‘Latino advocacy programs,’
‘immigration advocacy,’ ‘activism,’ and/or ‘organizing.’”

24 *Id.* at ¶ 45 (emphasis added).

25 Although ICE acknowledged receipt of the FOIA request, it did not respond to the
26 request before Plaintiff filed the initial complaint in this litigation.² *Id.* at ¶55. On May 30, 2018,
27 ICE produced a five-page response to the FOIA request—26 days after the filing of this suit and
28 68 working days after it received the request. *Id.* at ¶ 57. Further, in its cover letter, ICE

29 ² In April 26, 2018, prior to this lawsuit, ICE acting on referral from a request to USCIS produced certain
30 documents from Plaintiff’s A-File. ICE, however, did not respond to the FOIA request directed to it prior
31 to the initiation of this lawsuit. *See* First Amended Complaint at ¶55.

1 mischaracterized Plaintiff's request, stating that it was merely responding to a request for "ALL
2 RECORDS PERTAINING TO MARU/MARIA MORA VILLALPANDO, DOB: XX/XX/1970,
3 COB: MEXICO, A-2xx-xxx-xxx." *Id.* ICE's response did not raise any Privacy Act concerns,
4 nor did it refer to the Second or Third Requests. *See* Fuentes Decl., at Ex. 2.

5 Rather than promptly remedying its violations of the FOIA, on June 21, 2018, ICE filed
6 a legally meritless Motion to Strike allegations from Plaintiff's complaint. *See* Defendant's
7 Motion to Strike (Dkt. # 20). This court denied the motion to strike on July 23, 2018. *See* Order
8 denying Defendants' Motion to Strike (Dkt. # 26).

9 Pursuant to this Court's order directing the parties to confer and propose specific
10 deadlines to resolve the case, the parties agreed that ICE would produce any additional
11 responsive documents by September 21, 2018 and prepare a Vaughn index and serve it on
12 Plaintiff by October 22, 2018. *See* Stipulation and Order for Deadlines (Dkt. #31). Accordingly,
13 ICE released supplemental disclosures consisting of 339 pages on September 21, 2018 and an
14 additional 321 pages on October 4, 2018. *See* Fuentes Decl. at ¶¶ 23-24. On November 5, 2018,
15 ICE produced a final Vaughn Index describing the FOIA exemptions.

16 17 **B. Searches Conducted by ICE**

18 According to Defendant's declaration, ICE's FOIA office initially requested the Office
19 of Enforcement and Removal Operations (ERO) to conduct one general search. *Id.* at ¶ 32. The
20 request was submitted to ERO's Information Disclosure Unit (IDU). *Id.* Following this
21 litigation, ICE's FOIA office also tasked various sub-agencies to conduct several additional
22 searches. The following is a summary of all searches described in ICE's declaration:
23

1 1. *ERO IDU Search (“Search No. 1”)*

2 Initially, ERO IDU conducted “a search for all records pertaining to the Plaintiff.” The
3 search used the Plaintiff’s first name, last name, alien number (A-number), country of birth and
4 date of birth.” *Id.* at ¶ 33. ERO IDU searched four databases: Enforcement Integrated Database
5 (EID), EID Arrest Guide for Law Enforcement (EAGLE), the Immigration and Enforcement
6 Operational Records System’s (ENFORCE) Alien Removal Module (EARM), and the Central
7 Index System (CIS). *Id.*

8 ERO IDU explicitly did not conduct a search with respect to the Second and Third
9 Requests. The declaration states that generally ICE cannot perform these searches because
10 “[t]he Plaintiff did not provide any privacy waivers to obtain third party information which
11 would allow ICE to search for and provide such records” and because “ICE does not
12 specifically track the information requested in sections two and three of the Plaintiff’s FOIA.”
13 *Id.* at ¶ 34.

14 After the initiation of this litigation, ERO IDU tasked only two of its components to
15 conduct additional searches: the ERO Seattle Field Office and ERO Policy. *Id.* at ¶ 35.

16
17 2. *ERO Seattle Field Office Search (“Search No. 2”)*

18 Following this litigation, ERO IDU directed the Deputy Field Office Director (DFOD)
19 of the Seattle ERO Field Office to search for responsive records. *Id.* at ¶ 37. The DFOD
20 searched only his computer and his own Microsoft Outlook account. *Id.* He conducted a search
21 focused on the subjects referred to in the First Request “using terms such as ‘Maru Mora
22 Villalpando,’ ‘Maria Mora Villalpando,’ ‘Villalpando,’ ‘Maru Mora,’ ‘Northwest Detention
23 Center Resistance,’ ‘Latino Advocacy,’ as well as ‘NWDC Resistance.’” *Id.*

1

2 *3. ERO Policy Search (“Search No. 3”)*

3 Following this litigation, ERO IDU directed ERO Policy to search for responsive
 4 records. *Id.* at ¶36. A Detention and Deportation Officer (DDO) performed the search in the
 5 ERO Policy Library and “[t]he search was conducted using such search terms as: ‘Enforcement
 6 Action’, ‘Activism’, ‘Immigration Advocacy’, as well as ‘Immigration Rights Activists.’” *Id.*

7

8 *4. HSI Search (“Search No. 4”)*

9 Following this litigation, ICE directed Homeland Securities Investigations (HSI) to
 10 search for responsive records. *Id.* at ¶ 39. HSI tasked a Mission Support Specialist (MSS) to
 11 conduct the search. The MSS searched HSI’s Investigative Case Management System (ICM)
 12 “using such search terms as: ‘Maria Mora Villalpando,’ ‘Maru Mora Villalpando,’ ‘Northwest
 13 Detention Center Resistance,’ ‘NWDC Resistance,’ ‘Latino Advocacy,’ ‘Enforcement Action,’
 14 ‘Activism,’ ‘Immigration Advocacy,’ ‘Immigration Rights Activists,’ as well as the Plaintiff’s
 15 name, date of birth and A-number.” *Id.* at ¶ 40.

16

17 *5. OPLA Search (“Search No. 5”)*

18 Following this litigation, ICE directed the Office of the Principal Legal Advisor
 19 (OPLA) to search for responsive records. *Id.* at ¶ 41. OPLA tasked its Deputy Chief of
 20 Knowledge and Management Division (KMD) to conduct the search. *Id.* The Deputy Chief
 21 searched Microsoft Outlook, the Principal Legal Advisor’s Network (PLAnet) and Sharepoint
 22 databases “using such search terms as: ‘Maria Mora Villalpando,’ and ‘Villalpando.’” *Id.* at ¶
 23 42.

1 6. *ICE Policy Search* (“*Search No. 6*”)

2 Following this litigation, ICE directed ICE Policy to search for responsive records. *Id.*
 3 at ¶ 44. ICE Policy tasked a Management and Program Analyst (MPA) to conduct the search.
 4 *Id.* The MPA searched Policy Sharepoint, Shared Drive, Microsoft Outlook, and the Internal
 5 ICE Policy Manual “using such search terms as: ‘media,’ ‘family,’ ‘protest,’ ‘activism,’
 6 ‘advocacy,’ ‘Latino,’ ‘immigration status,’ and ‘press.’” *Id.* at ¶ 45

7
 8 7. *Office of Public Affairs* (“*Search No. 7*”)

9 Following this litigation, ICE directed the Office of Public Affairs (OPA) to search for
 10 responsive records. *Id.* at ¶ 47. OPA tasked the Division Chief of Mission Support (DCMM) to
 11 conduct the search. *Id.* The DCMM searched her computer, her Microsoft Outlook account,
 12 OPA’s shared drive and requested 27 employees in OPA to conduct searches of their computers
 13 and Microsoft Outlook accounts. *Id.* The DCMMs search was done “using such search terms
 14 as: ‘Mora Villalpando,’ ‘Latino Activist,’ ‘activist,’ ‘immigration advocacy,’ ‘activism,’
 15 ‘advocate,’ and ‘Villalpando.’” *Id.* at ¶ 48.

16
 17 **III. Legal Standard**

18 Summary judgment is appropriate when there is no genuine issue as to the material facts,
 19 and the moving party demonstrates it is entitled to judgment as a matter of law. Fed. R. Civ. P.
 20 56. FOIA lawsuits are generally resolved on cross-motions for summary judgment. *See Nat’l Res.*
 21 *Def. Council v. United States DOD*, 388 F. Supp. 2d 1086, 1094 (C.D. Cal. 2005)

22 Because there are rarely disputed issues of fact in FOIA cases, courts in this Circuit rely
 23 on a two-step inquiry when engaging in a summary judgment FOIA analysis. *See Minier v. CIA*,

1 88 F.3d 796, 800 (9th Cir. 1996); *Shannahan v. IRS*, 637 F. Supp. 2d 902, 912 (W.D. Wash.
2 2009).

3 First, courts must “determine whether the agency has met its burden of proving that it
4 fully discharged its obligations under FOIA.” *Los Angeles Times Commc’ns, LLC v. Dep’t of*
5 *Army*, 442 F. Supp. 2d 880, 893 (C.D. Cal. 2006) (citing *Zemansky v. EPA*, 767 F.2d 569, 571
6 (9th Cir. 1985)). To do so, “an agency must show beyond a material doubt, and viewing the facts
7 in light most favorable to the requester, that it has conducted a search reasonably calculated to
8 uncover all relevant documents.” *Lawyers’ Comm. for Civil Rights of S.F. Bay Area v. United*
9 *States Dep’t of the Treasury*, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008) (quoting *Weisberg v.*
10 *United States Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). *See also Albers v.*
11 *FBI*, Case No. 16-05249-BHS, 2017 U.S. Dist. LEXIS 26348, at *8 (W.D. Wash. Feb. 24, 2017).

12 The adequacy of the agency’s search “is judged by a standard of reasonableness and
13 depends, not surprisingly, upon the facts of each case.” *Zemansky*, 767 F.2d, at 571 (quoting
14 *Weisberg*, 745 F.2d, at 1485). Affidavits describing an agency’s search are “sufficient for
15 purposes of summary judgment only if they are relatively detailed in their description of the
16 files searched and the search procedures, and if they are nonconclusory and not impugned by
17 evidence of bad faith.” *Id.* at 573 (quotation omitted).

18 Second, once the agency meets its burden regarding the adequacy of the search, courts
19 look to “whether the agency has proven that the information that it did not disclose falls within
20 one of the nine FOIA exemptions.” *Shannahan v. IRS*, 637 F. Supp. 2d 902, 912 (W.D. Wash.
21 2009) (quotation omitted).

22 Finally, as a general matter, this Circuit has recognized that federal agencies have a duty
23 to interpret FOIA requests liberally in favor of disclosure. *See, e.g., Yagman v. Pompeo*, 868

1 F.3d 1075, 1080 (9th Cir. 2017) (“[W]e are persuaded that a duty of liberal construction
 2 accords with the basic purpose of FOIA to ensure an informed citizenry, vital to the functioning
 3 of a democratic society, needed to check against corruption and to hold the governors
 4 accountable to the governed.”) (quotation omitted); *Lawyers’ Comm. for Civil Rights of S.F.*
 5 *Bay Area v. Dep’t of the Treasury*, 534 F. Supp. 2d 1126, 1130 (N.D. Cal. 2008) (“An agency
 6 has a duty to construe a FOIA request liberally.”).

8 IV. ARGUMENT

9 ICE has not met its burden of showing “beyond a material doubt” that it conducted a
 10 search “reasonably calculated to uncover all relevant documents” because it did not perform *any*
 11 search whatsoever responsive to the Third Request and because it did not perform any search
 12 responsive to the Second Request in relevant ERO databases. ICE admits in its declaration that it
 13 never performed these searches. *See* Fuentes Decl. at ¶ 34. ICE’s decision to not conduct these
 14 searches is a violation of FOIA and is patently unreasonable because (1) it is premised on an
 15 incorrect application of both FOIA (5 U.S.C. § 552) and the Privacy Act (5 U.S.C. § 552a); and
 16 (2) ICE’s view that it cannot perform the searches because “it does not specifically track the
 17 information requested in sections two and three of the Plaintiff’s FOIA Request” is contradicted
 18 by the declaration itself, case law, and information made publicly available by DHS. In justifying
 19 its lack of search, ICE’s declaration relies on three sentences that are conclusory, completely
 20 lacking in any detail, and wrong as a matter of law.

21 Finally, ICE’s search was also inadequate because a number of the searches it *did*
 22 conduct were unreasonably limited with respect to the search terms used and the databases
 23 searched.

A. ICE’s Search is Inadequate Because it Did Not Perform Searches Responsive to the Second and Third Requests Within Relevant ERO Databases

ICE’s search is inadequate because it was not “reasonably calculated to uncover all relevant documents.” *Zemansky*, 767 F.2d at 571 (9th Cir. 1985). A FOIA search is inadequate if the agency does not search offices or databases that are likely to possess the requested documents. *See, e.g., Valencia-Lucena v. United States Coast Guard, FOIA/PA Records Mgmt.*, 180 F.3d 321, 323 (D.C. Cir. 1999) (“The agency cannot limit its search to only one or more places if there are additional sources that are likely to turn up the information requested”); *Nat’l Res. Def. Council v. U.S. Dep’t of Def.*, 388 F. Supp. 2d 1086, 1100-1101 (C.D. Cal. 2005) (Finding that an agency’s search was inadequate because it failed to search a sub-agency that likely had responsive documents).

The documents sought by the Second and Third Requests are most likely to be found in ICE’s ERO databases. ICE did not perform searches responsive to the Second Request within ERO databases, other than in the ERO Policy Library, and it did not perform any searches responsive to the Third Request in any database.

1. The records sought by the Second and Third Requests are most likely to be found in EROs databases

The information sought by the Third Request is most likely contained within the databases of the ERO. The Third Request seeks “copies of any I-213s, with identifying information redacted where ICE has initiated enforcement action against an individual” who is involved in activism or makes public statements to the media. First Amended Complaint at ¶ 45.

1 According to DHS’ own publications, the agency records I-213s within at least two ERO
2 databases, the Enforcement Integrated Database (EID) and EID Arrest Graphical User Interface
3 for Law Enforcement (EAGLE). *See* Bryan Baker, Annual Report, Office of Immigration
4 Statistics, *Immigration Enforcement Actions: 2016* (December 2017),
5 https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf.
6 (“Apprehension and inadmissibility data are collected in the Enforcement Integrated Database
7 (EID) using Form I-213, Record of Removable-Inadmissible Alien, and EID Arrest Graphical
8 User Interface for Law Enforcement (EAGLE)”).

9 Similarly, the documents sought in the Second Request are also most likely to be found in
10 the unsearched ERO databases. The Second Request seeks a variety of records “regarding
11 enforcement operations undertaken against individuals” who are involved in immigrant rights
12 activism or who provide public statements to the media regarding their or their family member’s
13 immigration status. First Amended Complaint at ¶ 44. Because ERO “manages all aspects of the
14 immigration enforcement process, including identification and arrest, domestic transportation,
15 detention, bond management, and supervised release,” ERO databases are likely where records
16 responsive to the Second Request are stored. Fuentes Decl. at ¶ 27.

17 Further, many of the records sought in the Second Request will not be located in the ERO
18 Policy Library because that request is not limited to records related to policies and guidelines.
19 For example, it also seeks “procedures, emails, trainings, press releases, public statements,
20 summaries, [and] post-investigation reports...regarding enforcement operations undertaken
21 against” activists. First Amended Complaint at ¶ 44. This information is most likely to be found
22 within ERO databases outside of the ERO Policy Library.
23

1 2. *ICE did not conduct a search responsive to the Second and Third Requests*
2 *within relevant ERO databases*

3 ICE's search is inadequate because it did not search ERO databases, or any other
4 databases, for documents responsive to the Third Request. Similarly, ICE did not search ERO
5 databases for documents responsive to the Second Request, other than the ERO Policy Library
6 database.

7 ICE performed three searches of ERO databases: Search No. 1, Search No. 2 and Search
8 No. 3. In Search No. 1, the most expansive search of ERO databases including EID and
9 EAGLE, ICE only conducted a search responsive to the First Request. Fuentes Decl. at ¶ 34
10 ("Although the second and third sections of the Plaintiff's FOIA request sought documents other
11 than those that pertained to the Plaintiff, a search for records *only* pertaining to the Plaintiff was
12 performed.") (emphasis added). In Search No. 2, ICE searched one computer and one Microsoft
13 Outlook account within a single ERO field office using search terms identified only in the First
14 Request. *Id.* Search No. 2 thus was not responsive to the Second and Third Requests and was
15 limited to one of ERO's 24 field offices. *See* Contacting Field Offices, *available at*
16 <https://www.ice.gov/contact/ero> (last accessed 02/01/2019). Finally, in Search No. 3, ICE
17 searched only one database, the ERO Policy Library using policy-related search terms for
18 records that could be responsive to the Second Request. *Id.* at ¶ 36. Accordingly, Search No. 3
19 was not responsive to the Third Request, a request for I-213s, and it did not involve any ERO
20 database other than the ERO Policy Library. ICE did not conduct any other searches within other
21 ERO databases.

22 //

23 //

1 In sum, ICE's search was inadequate because it did not perform any searches responsive
 2 to the Second and Third Requests within relevant ERO databases, even though these databases
 3 are where the sought records are most likely to be found. *See Zemansky*, 767 F.2d at 571. Had
 4 ICE conducted those searches, the agency would have likely found responsive records related to
 5 enforcement actions against activists including those referenced in Plaintiff's complaint. *See*
 6 First Amended Complaint, at ¶ 18. Plaintiff attaches one such record, an I-213 that references an
 7 individual's membership in an "immigrant advocacy" group, as Exhibit 1.

8
 9 **B. ICEs Decision to Not Perform the Searches is Unreasonable and a Violation of**
 10 **FOIA**

11 ICE's refusal to perform Second Request searches within relevant ERO databases (other
 12 than the ERO Policy Library) and Third Request searches within any ERO database is
 13 unreasonable and a violation of FOIA. The declaration states that ICE did not perform these
 14 searches for two reasons. First, "[t]he Plaintiff did not provide any privacy waivers to obtain
 15 third party information which would allow ICE to search for and provide such records." Fuentes
 16 Decl. at ¶ 34. ICE mischaracterizes the Second and Third Requests as seeking third party
 17 information. It makes a passing reference to the Privacy Act, incorrectly asserting through a
 18 footnote that "[p]ursuant to the Privacy Act of 1974 a request for records for a third party must
 19 be accompanied by a Privacy Waiver, or proof that the individual who is the subject of the
 20 records is deceased. The Plaintiff did not provide either."³ *Id.* Second, the declaration alleges

21 _____
 22 ³ It is unclear why ICE interprets the Second and Third Requests as seeking private third party
 23 information. Neither request on its face mentions any individual specifically and the Third Request
 expressly notes, to avoid any confusion, that Plaintiff is seeking "I-213s, with identifying information
 redacted." If the Privacy Act were relevant here, ICE's interpretation would be in violation of its duty to
 interpret FOIA requests liberally in favor of disclosure. *See Yagman v. Pompeo*, 868 F.3d 1075, 1080 (9th
 Cir. 2017).

1 that “ICE does not specifically track the information requested in sections two and three of the
2 Plaintiff’s FOIA.” *Id.* at ¶ 34 Both of these justifications are invalid.

3
4 *1. ICE’s reliance on the Privacy Act (5 U.S.C. § 552a) is erroneous and in*
5 *violation of FOIA.*

6 ICE’s attempt to evade its obligations under FOIA by relying on the Privacy Act (5
7 U.S.C. § 552a) in its declaration is misplaced because this is an action under FOIA and not the
8 Privacy Act and because such reliance is in violation of FOIA.

9 First, this is not an action under the Privacy Act. The “FOIA and the Privacy Act are
10 distinct mechanisms for obtaining government information, and it is legal error to conflate
11 them.” *Gonzales & Gonzales Bonds & Ins. Agency Inc v. U.S. Dep’t of Homeland Sec.*, 913 F.
12 Supp. 2d 865, 868 n.3 (N.D. Cal. 2012) (citing *U.S. Dep’t of Defense v. FLRA*, 510 U.S. 487,
13 494 (1994)). While the initial request was both a FOIA and Privacy Act request, this litigation
14 only involves the FOIA request. *See* First Amended Complaint, at ¶ 1. Moreover, ICE’s initial
15 cover letter following Search No. 1 treated the search as responsive *only* to FOIA. *See* Fuentes
16 Decl., Ex. 2 (“This letter is the final response to your Freedom of Information Act (FOIA)
17 request to U.S. Immigration and Customs Enforcement (ICE)...[i]f you are requesting access to
18 your own records (which is considered a Privacy Act request), you should know that OGIS does
19 not have the authority to handle requests made under the Privacy Act of 1974.”). Therefore, the
20 relevant statutory provision governing this request is FOIA, 5 U.S.C. § 552.

21 There is no requirement under FOIA (5 U.S.C. § 552) that a third party waiver be
22 provided before a search pertaining to third parties may be conducted. In fact, one district court
23 invalidated a former DHS regulation governing FOIA that required such third party waivers

1 before a FOIA request is processed because it was a violation of FOIA. *See Gonzales &*
2 *Gonzales Bonds & Ins. Agency Inc. v. United States Dep't of Homeland Sec.*, 913 F. Supp. 2d
3 865, 867 (N.D. Cal. 2012) (invalidating former 6 C.F.R. § 5.3 as a violation of FOIA because it
4 required DHS FOIA requests pertaining to third parties to include third party waivers).

5 The difference between DHS's own implementing regulations governing its agency's
6 FOIA requests and Privacy Act requests makes it clear that no third party waiver is required for a
7 search to be performed under FOIA. *Compare* 6 C.F.R. § 5.3 (regulation governing FOIA)
8 (“Where a request for records pertains to a third party, a requester *may receive greater access* by
9 submitting either a notarized authorization signed by that individual...or a declaration...by that
10 individual, authorizing disclosure of the records to the requester, or by submitting proof that the
11 individual is deceased (e.g., a copy of a death certificate or an obituary)”(emphasis added) *with* 6
12 C.F.R. § 5.21(f) (regulation governing Privacy Act requests) (“(f) Verification in the case of third
13 party information requests...*You must* also provide a statement from the individual certifying the
14 individual's agreement that records concerning the individual may be released to you.) (emphasis
15 added).

16 Second, ICE's use of the Privacy Act to forgo its duty to search under FOIA is a violation
17 of FOIA. The statutory language of the two acts clarifies that the provisions of the Privacy Act
18 cannot be used as a shield to protect agencies from their obligations under FOIA. On the one
19 hand, under FOIA (5 U.S.C. § 552), agencies are required “upon any request for records” to
20 make such records “promptly available to any person.” 5 U.S.C. § 552(a)(3). Agencies can
21 choose not to disclose records where an exemption applies. *See* 5 U.S.C. § 552(b). Section
22 552a(b) of the Privacy Act, on the other hand, states that:

23 //

1 “(b) no agency shall disclose any record which is contained in a system of records by any
 2 means of communication to any person, or to another agency, except pursuant to a
 3 written request by, or with the prior written consent of, the individual to whom the record
 pertains, *unless disclosure of the record would be... (2) required under section 552 of this
 title (FOIA).*”

4 5 U.S.C. § 552a(b) (emphasis added). This provision explains that the Privacy Act cannot bar the
 5 disclosure of records that FOIA makes public but may require the mandatory withholding of
 6 records that are exempt from FOIA. As one circuit court put it, “[t]he net effect of the interaction
 7 between the two statutes is that *where the FOIA requires disclosure, the Privacy Act will not
 8 stand in its way*, but where the *FOIA would permit withholding under an exemption, the Privacy
 9 Act makes such withholding mandatory upon the agency.*” *News-Press v. United States Dep’t of
 10 Homeland Sec.*, 489 F.3d 1173, 1206 (11th Cir. 2007) (emphasis added). Given this statutory
 11 scheme, the Privacy Act bars FOIA disclosures *only* where a FOIA exemption applies to a record
 12 covered by the Privacy Act. This is not the case here. Before claiming any exemptions, ICE has
 13 simply refused to conduct a search, as is required by FOIA, by erroneously citing to the Privacy
 14 Act.

15 In *Grove v. CIA*, 752 F. Supp. 28 (D.D.C. 1990), a district court faced this exact issue of
 16 whether an agency can avoid performing a search under FOIA by citing to the Privacy Act. As
 17 here, the agencies in that case provided the district court with a declaration indicating “that they
 18 refused to search for records responsive to plaintiff’s request 1-4, absent signed release
 19 authorizations from the individuals that were the subjects of those requests.” *Id.* at 30. The
 20 declaration’s author also “makes passing reference to the Privacy Act, 5 U.S.C. § 552a.” *Id.* That
 21 court unsurprisingly held that “the Privacy Act is not to be used as a barrier to FOIA access.” *Id.*
 22 at 30 (quotation omitted). The court found that because it’s the agency’s burden to prove that an
 23 exemption applies, the defendants in that case “have either failed to claim legal exemptions

1 under the FOIA, or they have failed to provide support for a claim that an exemption would
 2 apply.” *Id.* at 30. In this case, ICE has committed the same error.

3
 4 *2. ICE’s reliance on the claim that it “does not specifically track” the*
 5 *information sought in the Second and Third Requests is unreasonable*

6 The adequacy of the agency’s search “is judged by a standard of reasonableness and
 7 depends, not surprisingly, upon the facts of each case.” *Zemansky*, 767 F.2d, at 571 (quoting
 8 *Weisberg*, 745 F.2d, at 1485). In this case, Defendant’s contention that it could not search ERO
 9 databases because “ICE does not specifically track the information requested in sections two
 10 and three of the Plaintiff’s FOIA Request” is unreasonable because it is lacking in sufficient
 11 detail and contradicted by the declaration itself, case law, and information made publicly
 12 available by DHS.

13 Affidavits describing an agency’s search are “sufficient for purposes of summary
 14 judgment *only if* they are relatively detailed...if they are nonconclusory and not impugned by
 15 evidence of bad faith.” *Zemansky*, 767 F.2d, at 573 (emphasis added). Here, ICE’s declaration is
 16 devoid of detail and conclusory in justifying its failure to perform the ERO searches. Given the
 17 extensive nature of the Second and Third Requests, a blanket statement that the records sought
 18 by the requests are “not specifically track[ed]” is so broad as to be meaningless. It is unclear
 19 from the declaration what specific aspect of each request is not tracked by ICE.

20 Moreover, ICE’s justification is contradicted within the same declaration. While the
 21 declaration implies that ICE could not perform a search responsive to the Second Request
 22 because it does not track the information requested, two different ICE components in fact
 23 performed a search responsive to the Second Request in Search No. 3 and Search No. 6. ICE

1 conducted those policy-related searches because the Second Request sought agency policies
 2 regarding ICE's treatment of immigrant activists. *See Fuentes Decl.* at ¶¶ 36, 44. This
 3 demonstrates that ICE is not impeded from performing a search responsive to the Second
 4 Request within ERO's unsearched databases.⁴

5 ICE's reasoning is also contradicted by information about its databases available to the
 6 public and prior case law. There can be no serious dispute about whether ICE specifically tracks
 7 I-213s. As noted earlier, DHS records I-213s within two ERO databases, the Enforcement
 8 Integrated Database (EID) and EID Arrest Graphical User Interface for Law Enforcement
 9 (EAGLE). *See* Bryan Baker, Annual Report, Office of Immigration Statistics, *Immigration*
 10 *Enforcement Actions: 2016* (December 2017), [https://www.dhs.gov/sites/default](https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf)
 11 [/files/publications/Enforcement_Actions_2016.pdf](https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf). Respondents in immigration court
 12 regularly file FOIA requests seeking their A-File, which is a collection of documents that DHS
 13 maintains for foreign-born individuals in the United States and which includes the I-213 form.
 14 *See Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 Brooklyn L. Rev.
 15 1569, 1621. Not only can DHS agencies track individual I-213s, but they have in prior FOIA
 16 cases demonstrated that they can track and release all Form I-213s completed within a specific
 17 time period by an agency and all Form I-213s that include a specific search term. For example,
 18 in *Buffalo Evening News, Inc. v. United States Border Patrol*, 791 F. Supp. 386, 388 (W.D.N.Y.
 19 1992), DHS released hundreds of I-213 forms in response to a FOIA request to a DHS agency
 20 requesting "all Forms I-213" completed by that agency "from June to August 1988." In

21
 22 ⁴ These other searches do not render ICE's search adequate with respect to the Second Request because
 23 the agency has not yet conducted any responsive searches within non-policy ERO databases, or provided
 a reasonable justification for why it need not search databases where the records sought are most likely to
 be found. Additionally, Searches No. 3 and No. 6 are only responsive to policy-related records within
 Request 2.

1 *Hernandez v. United States Customs & Border Prot. Agency*, No. 10-4602, 2012 U.S. Dist.
 2 LEXIS 14290 (E.D. La. Feb. 6, 2012), DHS released I-213 forms pertaining to 62 individuals
 3 following a FOIA request that sought all I-213 forms that included a specific method of locating
 4 or apprehending an individual. Notably, there was no Privacy Act objection raised in those cases
 5 to the search for or release of the I-213s, further undermining the agency's arguments here that
 6 the Privacy Act precludes performing a search.

7
 8 **C. ICE's Search was Inadequate Because it was Unreasonably Limited with
 Respect to the Search Terms Used and the Databases Searched**

9 A number of the searches that ICE did conduct were also inadequate because they were
 10 unreasonably limited with respect to the search terms ICE used and the databases ICE searched.

11 In Search No. 5, OPLA conducted a search that was narrowly limited to "such search
 12 terms as: 'Maria Mora Villalpando,' and 'Villalpando.'" This narrow search demonstrates that
 13 OPLA never conducted a search reasonably calculated to find records responsive to the Second
 14 or Third Requests. In fact, OPLA's search terms did not even cover the subjects of record noted
 15 in the First Request, which included "NWDC Resistance" and "Latino Advocacy." Given that
 16 OPLA is the "exclusive representative of DHS in immigration removal proceedings...litigating
 17 all removal cases," a simple search using variations of Plaintiff's name is not reasonably
 18 calculated to uncover documents relevant to Plaintiff's multi-part, multi-page FOIA request on
 19 the targeting of immigrant rights activists for removal. *Id* at ¶ 30. Had OPLA conducted an
 20 adequate search, it would have used search terms such as "Northwest Detention Center
 21 Resistance", "Latino Advocacy", "NWDC Resistance", "immigration advocacy", "immigration
 22 rights activist", "activism", "media", "protest", "advocacy", and "advocate."⁵

23
⁵ Other ICE agencies used these exact terms to search for records responsive to this request. *See Fuentes Decl.* at ¶¶ 36-37, 39, 45, 47.

1 Search No. 2 was also not reasonably calculated to find records responsive to the FOIA
2 request because it was limited to a single ERO Field Office in Seattle. ICE states that “[a]s the
3 Plaintiff’s immigration matter is located in Seattle, the Seattle ERO Field Office would be the field
4 office most likely to have records responsive to the Plaintiff’s.” *Id.* at ¶ 37. As noted earlier,
5 Plaintiff’s request does not only pertain to her own removal case but also to enforcement actions
6 against other activists. It is therefore unreasonable for ICE not to have searched other Field Offices
7 for records responsive to the Second and Third Requests.

8 Not only was Search No. 2 not reasonably calculated to find records responsive to the
9 Second and Third Requests, the choice of databases searched indicates that the search was
10 inadequate with respect to the First Request as well. The Deputy Field Office Director searched
11 *only* his computer and his own Microsoft Outlook account. *Id.* According to the declaration, “no
12 other officers were likely to have responsive records or would reasonably be expected to have
13 responsive records.” It is unreasonable that no other officer within the Seattle ERO Field Office
14 had any records responsive to the First Request. This litigation has already uncovered hundreds
15 of pages of e-mails and other documents pertaining to Plaintiff’s removal case indicating the
16 high-profile nature of this case within the Seattle ERO Field Office. It is implausible that records
17 responsive to the First Request exist only within one computer and one Microsoft Outlook
18 account belonging to a single officer within the Seattle ERO Field Office.

19 The unreasonable narrowness of Searches No. 5 and No. 2 indicate that ICE
20 misconstrued Plaintiff’s request and contravened the agency’s “duty of liberal construction.”
21 *Yagman v. Pompeo*, 868 F.3d 1075, 1080 (9th Cir. 2017). *See also Sack v. Dep’t of Justice*, 65 F.
22 Supp. 3d 29, 36 (D.D.C. 2014) (finding an agency’s narrow use of search terms was insufficient
23 to prove it conducted an adequate search).

V. CONCLUSION

In sum, ICE has not demonstrated beyond a material doubt it has conducted a search reasonably calculated to uncover all relevant documents because it did not conduct searches responsive to the Second and Third Request in the databases that are most likely to contain responsive records. ICE's declaration provides no rational explanation for why it did not conduct these searches. ICE's decision to not perform these searches is unreasonable and is a violation of FOIA. ICE's search was also inadequate because a number of the searches it did conduct were unreasonably limited with respect to the search terms used and the databases searched.

For all the forgoing reasons, the Court should grant Plaintiff's Cross Motion for Summary Judgment and deny Defendant's Motion for Summary Judgment with respect to the adequacy of ICE's search for responsive records, and order ICE to immediately conduct a search reasonably calculated to uncover the requested records. The new search should include, at a minimum: (1) searches responsive to the Third Request generally; (2) searches responsive to the Second and Third requests within the unsearched ERO databases, including searches of EID, EAGLE, ENFORCE, EARM, CIS and all national ERO Field Offices; (3) searches responsive to the Second and Third requests within OPLA databases; and (4) a search reasonably calculated to uncover all relevant documents responsive to the First Request within ERO's Seattle Field Office.

Respectfully submitted this 4th day of February, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2019 I served a copy of the foregoing *Plaintiff's Cross Motion for Summary Judgement* and any attachments thereto on the following persons via this Court's ECF system:

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